SUPREME COURT OF WISCONSIN

STATE OF WISCONSIN,

Plaintiff-Respondent-Cross-Appellant,

v.

ABBOTT LABORATORIES, ASTRAZENECA LP, ASTRAZENECA PHARMACEUTICALS LP, AVENTIS BEHRING, LLC F/K/A ZLB BEHRING, LLC, AVENTIS PHARMACEUTICALS, INC., BEN VENUE LABORATORIES, INC., BOEHRINGER INGELHEIM PHARMACEUTICALS, INC., BOEHRINGER INGELHEIM ROXANE, INC., BRISTOL-MYERS SQUIBB CO., DEY, INC., IVAX CORPORATION, IVAX PHARMACEUTICALS, INC., JANSSEN LP F/K/A JANSSEN PHARMACEUTICA PRODUCTS, LP, JOHNSON & JOHNSON, INC., MCNEIL-PPC, INC., MERCK & CO. F/K/A SCHERING-PLOUGH CORPORATION, MERCK SHARP & DOHME CORP. F/K/A MERCK & COMPANY, INC., MYLAN PHARMACEUTICALS, INC., MYLAN, INC. F/K/A MYLAN LABORATORIES, INC., NOVARTIS PHARMACEUTICALS CORP., ORTHO BIOTECH PRODUCTS, LP, ORTHO-MCNEIL PHARMACEUTICAL, INC., PFIZER INC., ROXANE LABORATORIES, INC., SANDOZ, INC. F/K/A GENEVA PHARMACEUTICALS, INC., SICOR, INC. F/K/A GENSIA SICOR PHARMACEUTICALS, INC., SMITHKLINE BEECHAM CORP. D/B/A GLAXOSMITHKLINE, INC., TAP PHARMACEUTICAL PRODUCTS, INC., TEVA PHARMACEUTICALS USA, INC., WARRICK PHARMACEUTICALS CORPORATION, WATSON PHARMA, INC. F/K/A SCHEIN PHARMACEUTICALS, INC. AND WATSON PHARMACEUTICALS, INC.,

Defendants,

PHARMACIA CORPORATION,

Defendant-Appellant-Cross-Respondent.

COURT OF APPEALS, DISTRICT II
APPEAL NO. 2010AP000232-AC
TRIAL COURT NO. 2004CV001709

CROSS-RESPONDENT'S BRIEF

O. Thomas Armstrong, SBN 1016529
Beth J. Kushner, SBN 1008591
Douglas M. Raines, SBN 1059539
von BRIESEN & ROPER, s.c.
411 East Wisconsin Ave., Suite 700
Milwaukee, WI 53202
Tel: (414) 276-1122
Fax: (414) 276-6281

John C. Dodds
Erica Smith-Klocek
Máire E. Donovan
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
Tel: (215) 963-5000
Fax: (215) 963-5001

John Clayton Everett, Jr.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue
Washington, DC 20004
Tel: (202) 739-3000
Fax: (202) 739-3001

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I. STATEMENT OF ISSUES

1. DOES THE STATE'S THEORY OF FORFEITURES UNDER WIS. STAT. § 49.49(4m)(a) IMPOSE A FORFEITURE FOR EACH FALSE STATEMENT OF MATERIAL FACT THAT A DEFENDANT KNOWINGLY CAUSED TO BE MADE?

   Answered by the trial court: No.

2. CAN WIS. STAT. § 49.49(4m)(b) BE INTERPRETED TO PROVIDE FOR A FORFEITURE FOR EACH USE BY THE STATE OF A STATEMENT OF FACT THAT VIOLATES WIS. STAT. § 49.49(4m)(a)?

   Answered by the trial court: No.

II. NATURE OF THE CASE

Wisconsin Medicaid ("Medicaid") reimburses pharmacists for dispensing branded prescription drugs to Medicaid patients at a formula set by the legislature. The legislature has chosen to use, as one component of that formula, a discount from something called "Average Wholesale Price" ("AWP"), which is published by a third-party data company called First DataBank. Although the legislature knows that the AWPs published by First DataBank do not represent actual prices, the State alleges in this case that AWPs are false because they are not actual prices.

The Court of Appeals certified to this Court a question of law: how to determine the number of statutory violations of Wis. Stat. § 49.49(4m). The State claims that Pharmacia is liable for a forfeiture not for Pharmacia's conduct—*i.e.*, the number of times it made or allegedly caused First DataBank to make a representation about AWP—but instead for the State's own conduct—*i.e.*, the number of times that the State used AWP to reimburse pharmacists as the legislature directed. This forfeiture theory fails as a matter of law because:

a. It is contrary to the plain language of § 49.49(4m), its legislative history, and applicable caselaw. The forfeiture provision of § 49.49(4m) penalizes a defendant for each statement that violates § 49.49(4m)(a), not for each time Medicaid uses such a statement;

b. It would improperly penalize Pharmacia for the State's own decisions and actions. The State could have based reimbursement on other data published by First DataBank, but chose to use AWP. Indeed, in ruling on the State's forfeiture petition, the trial court specifically noted "the State of Wisconsin's own role in causing the damages" (A.Ap. at 100-01)[1]; and

[1] References to "A.Ap." are cites to the Appendix to Appellant's Brief.

c. When used as a "data element" in the Medicaid computer program, AWP is not a statement of fact, not false, and not knowingly caused to be made by drug manufacturers.

Moreover, the State both waived the position it now asserts and failed to prove it at trial. For those reasons, the trial court's rejection of the State's theory, and its decision to strike the jury's answer, should be affirmed.

III. STATEMENT OF FACTS

A. MEDICAID'S DRUG REIMBURSEMENT SYSTEM

1. *The Reimbursement Formula Set by the Legislature*

Pharmacists dispense prescription drugs in accordance with prescriptions written by doctors. Wis. Stat. §§ 450.01(16)(a) and (b) (2011); WIS. ADMIN. CODE Phar. § 7.01(1)(a) (2011). The Wisconsin legislature has directed Medicaid to reimburse pharmacists for branded prescription drugs dispensed to Medicaid patients based on a formula that employs published AWPs. (Appellant's Brief ("AB") at 15-17.) As the legislature knows, AWPs do not represent actual drug prices. (*Id.* at 18-20.)

For generic drugs, Medicaid reimburses pharmacists based on maximum allowable cost ("MAC"). (*Id.* at 13-14.) Medicaid independently determines what pharmacists pay for drugs (without reference to AWP) and marks up those prices to set MACs. (*Id.*)

2. *The Pricing Data Supplied to Wisconsin Medicaid*

Medicaid contracts with Electronic Data Systems Corporation ("EDS") to act as the State's claims processor. (A.Ap. at 234-35.) EDS obtains pricing information from First DataBank. (*Id.*) First DataBank sells many different types of pricing information, and a customer chooses what it wants from First DataBank's "menu" of information. (A.Ap. at 262-63.) First DataBank licenses to EDS its National Drug Data File ("NDDF"), a "comprehensive drug product information database" that includes AWPs. (C.Resp.Ap. at 1-21.)

AWPs, however, are only one item on the menu of information that First DataBank supplies EDS for Wisconsin's reimbursement program. (C.Resp.Ap. at 22-41; C.Resp.Ap. at 42-

62.) In addition to AWPs, First DataBank provides Wisconsin with Direct Prices, which are the prices at which manufacturers sell directly to pharmacists. (A.Ap. at 262; R.434 at 226:4-19; C.Resp.Ap. at 22-41; C.Resp.Ap. at 42-62.) Until 2000, the State used Direct Prices for reimbursing drugs manufactured by certain manufacturers, including Upjohn, the predecessor to Pharmacia. (A.Ap. at 264-70; A.Ap. at 272-74.) First DataBank also provides Wisconsin with Wholesale Acquisition Costs ("WACs"), the prices at which manufacturers typically sell to wholesalers. (A.Ap. at 262.)

For branded drugs, First DataBank applies its own algorithm to determine AWP. (C.Resp.Ap. at 69-73.) For all branded manufacturers, it adds either 20% or 25% to the WAC to arrive at what it calls "Blue Book AWP." (*Id.*) This Blue Book AWP is one of the data elements that are transmitted to EDS. (A.Ap. at 261-63; R.434 at 219:17-:23, 226-27.) Although a branded manufacturer may suggest an AWP, First DataBank publishes that number in a field called "Suggested AWP," which

Wisconsin did not purchase or receive. (A.Ap. at 258-59; A.Ap. at 244.) First DataBank expressly disclaims any warranties or representations as to the accuracy of the data it supplies, or its fitness for any particular use. (C.Resp.Ap. at 1-21.)

AWPs are referred to in the Functional Specifications for the Medicaid program as "Elements." (C.Resp.Ap. at 22-41; C.Resp.Ap. at 42-62.) The data file from First DataBank containing AWPs updates automatically and the frequency of the updates varied during the relevant time period. (C.Resp.Ap. at 1-21; C.Resp.Ap. at 74-82.) Updates are limited to changes to existing prices; they do not constitute new replacement files. (C.Resp.Ap. at 83-89.)

3. *Medicaid Claims Processing*

Pharmacists do not enter AWPs on their claim forms when submitting claims for reimbursement. (A.Ap. at 298-99.) Rather, pharmacists identify their "usual and customary charge." (*Id.*) The "usual and customary" charge is the pharmacist's charge for providing the same service to the cash-paying public. WIS. ADMIN. CODE DHS § 101.03(181) (2011).

When a pharmacist submits a claim, the EDS computer program determines whether to accept or reject it. (C.Resp.Ap. at 93-94; R.436 at 158:3-159:16.) If the claim is accepted, the computer determines the amount of reimbursement based on a pricing algorithm, with payment being the lowest of the following calculations, plus a dispensing fee:

a. The EAC[2] (AWP minus the percentage selected by the legislature);

b. The pharmacist's "usual and customary" charge;

c. The current MAC for the drug, if a generic; or

d. The Federal Upper Limit ("FUL") for the drug.

(C.Resp.Ap. at 96.)

EDS processes approximately 450,000 Medicaid reimbursement claims each week. (C.Resp.Ap. at 92; R.436 at 157:3-11.) Seventy percent of those claims are for generic drugs. (*Id.* at 91; 436 at 32:6-16.)

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[2] Estimated Acquisition Cost ("EAC") is defined as a state's "best estimate of the price generally and currently paid by providers for a drug." 42 C.F.R. § 447.502 (2011).

B. PHARMACIA

Pharmacia manufactures both branded and generic drugs (A.Ap. at 105-06.) It sets two prices for its brand drugs: (a) Wholesale Acquisition Cost ("WAC"), the price at which it sells to wholesalers (R.227, Ex. 11 at sealed deposition page 78:11-14); and (b) Direct Price, the price at which it sells to retailers (*id.* at 76:14-78:16). Those prices are provided to data publishers, including First DataBank. (R227, Ex. 12 at sealed deposition page 41:9-42:7, 44:17-45:2.)

Pharmacia's subsidiary, Greenstone, manufactures and sells generic versions of Pharmacia's branded drugs. (A.Ap. at 250-51; R.438 at 70:21-71:4.) Roughly 5% of Greenstone's business is dispensed by pharmacies that are reimbursed by Medicaid programs. (A.Ap. at 252; R.438 at 88:13-15.)

At trial, the State offered into evidence a total of three documents that Pharmacia sent to First DataBank. (C.Resp.Ap. at 99-111; C.Resp.Ap. at 112; C.Resp.Ap. at 113-17.) These documents were all created in 2000, and listed WACs and/or Direct Prices, and Suggested AWPs. (*Id.*) The State offered no

evidence of other communications between Pharmacia and First DataBank.

C. THE LAWSUIT, THE SETTLEMENTS, AND THE FORFEITURE CLAIM

The State filed its Complaint in June 2004. (A.Ap. at 1-22.) In its § 49.49(4m) claim, the State asked for "[f]orfeitures in the amount of not less than $100 and not more than $15,000 for each AWP reported by each defendant for the last ten years." (*Id.* at 20.) This demand was repeated in three subsequent versions of the Complaint. (R.6; R.68; A.Ap. at 23-58.)

In late 2008 and early 2009, the State dismissed three defendants in exchange for financial settlements. (R.312 at 28-51.) The State did not require that any of those defendants change their price-reporting practices, and Medicaid still reimburses for their drugs based on First DataBank's AWPs. (*Id.*; C.Resp.Ap. at 123; R.443 at 148:6-16.)

The claims against Pharmacia were tried to a jury, over Pharmacia's objection. (A.Ap. at 59-66.) The State proposed the following jury instruction for its forfeiture claim:

> In answering question no. __ of the special verdict, you are instructed to calculate **the number of claims** submitted by providers to the Wisconsin Medicaid Program **that were calculated** using a price other than what would have been used had the defendant reported a truthful price.

(C.Resp.Ap. at 126 (emphasis supplied).)

The State also requested the following Special Verdict question for the forfeiture claim:

> Question No. 8: If you answered "yes" to Question No. 6, how many false payments did Pharmacia cause to be made?
>
> Answer: _____ (**Total number of claims that were calculated** using a price other than a price that would have been used had the defendant reported a truthful price).

(A.Ap. at 464-67 (emphasis supplied).)

The trial court did not adopt the State's proposed jury instructions and Special Verdict form. Instead, the trial court submitted Verdict Question No. 5 that asked "**[h]ow many such false statements or representations of material fact for use in determining rights to a Wisconsin Medicaid payment did Pharmacia Corporation knowingly make or cause to be made?**" (A.Ap. at 69 (emphasis supplied).) The

State did not object to the trial court's rejection of its proposed instruction and verdict question.

Despite the trial court's disallowance of the State's "number of claims" theory, the State nevertheless asked the jury in its closing argument to answer Verdict Question No. 5 with the number of claims that Medicaid had processed:

> [The State's damages expert] told you there were 1,000,500 of these claims that if the true price had been given, we would have paid less on. 1,500,000. But because of the statute of limitation, 4 percent of those are out and you have to subtract 60,000. This is from the time period January 3rd of 1993 to June 3rd of 1994. There's a year and a half roughly there at the very beginning that the statute of limitations precludes us from seeking damages on. And that was 60,000 claims, so you have to subtract that. **And the number of claims was 1,440,000. And that's the number that you should put as an answer to question No. 5.**

(A.Ap. at 460-61; R.441 at 108:23-109:15.)

The jury answered the question as the State requested. (A.Ap. at 67-70.)

D. POST-VERDICT MOTIONS

After verdict, the State asked that the trial court find over 1.4 million violations and award approximately $212,000,000 in

forfeitures. (R.307.) Pharmacia timely moved for judgment notwithstanding the verdict, for a directed verdict, to change the answers in the verdict, and for a new trial. (R.309.)

At the hearing on Pharmacia's post-verdict motions, the trial court noted that "**[t]he forfeiture case here was almost a throw-away in terms of the way it was presented, and the jury was left with very little.**" (A.Ap. at 81; R.443 at 109:1-4 (emphasis supplied).)[3]

The trial court asked the State, "**[w]hy did you choose to do your case on the basis of the claims made by pharmacists? I know you say that that's sufficient, but I'm having trouble fitting that in the statute, quite frankly.**" (A.Ap. at 73; R.443 at 45:8-11 (emphasis supplied).) The State responded that § 49.49 was ambiguous (C.Resp.Ap. at 120-22), and that the language of the statute was less important than "the principle" (*id.* at 119). The trial court found that the State's theory "cannot be a correct interpretation or application of the

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[3] The State's fee petition in this case established that the State first began to research forfeitures after verdict. (R.351 at 3 n.1.)

statute because it is not directed at the actual culpable conduct of Pharmacia, but at the consequences of that conduct." (A.Ap. at 90.)

The trial court vacated the jury's answer to Question No. 5 on May 15, 2009. (*Id.*) On September 30, 2009, the trial court supplied an answer to Question No. 5, holding that Pharmacia made or caused to be made 4,578 misrepresentations. (A.Ap. at 99.) This number represented the trial court's calculation of the number of updates that First DataBank transmitted to EDS for Pharmacia drugs for which Medicaid reimbursed a pharmacist at least once during the relevant time period. (*Id.*)

In considering the dollar amount for each forfeiture, the trial court believed it was required to accept the jury's finding of fraud. (A.Ap. at 100.) The court also noted:

> Substantially complicating and mitigating the forfeitures issues is the role of the plaintiff, through its legislative and executive branches, in setting the formulas for reimbursing pharmacies dispensing Pharmacia products within the Wisconsin Medicaid system. The evidence is compelling that a political tug-of-war between various interest groups spanning a number of successive biennial budget sessions

> resulted in the adoption of reimbursement formulas that were known to overcompensate participating Wisconsin pharmacies. In this respect, plaintiff's case has a Captain Renault quality to it, insofar as the plaintiff professes to be 'shocked—shocked!' that the AWP system has resulted in overpayments to pharmacies. **The jury's finding of fraud on the part of Pharmacia does not in any way exonerate the State of Wisconsin's own role in causing the damages.**

(*Id.* at 100-01 (emphasis supplied).)

The trial court set each forfeiture at $1,000, for a total forfeitures award of $4,578,000. (*Id.* at 101.)

IV. ARGUMENT

The State's position rests on the notion that, for each reimbursement claim, the State's computer system "asks" itself for the AWP, and that a violation of § 49.49(4m)(a) occurs each time the computer "answers" itself. This notion is legally baseless and, in any event, was waived before the trial concluded. Moreover, to the extent that the Court wishes to address the evidentiary issues the State has raised on appeal but were not

certified to this Court, the State failed to prove its claim against Pharmacia.[4]

A. THE STATE'S THEORY ON APPEAL IS UNSUPPORTED BY THE PLAIN MEANING OF WIS. STAT. § 49.49(4m), THE LEGISLATIVE INTENT OF THE STATUTE, AND THE APPLICABLE CASELAW.

The meaning of a term used in a statute is a question of law, subject to *de novo* review. *Konneker v. Romano*, 2010 WI 65, ¶24, 326 Wis. 2d 268, 785 N.W.2d 432. The threshold inquiry for this Court is to determine the relevant "unit of prosecution" under § 49.49(4m). When the legislative intent as to the appropriate unit is unequivocal, either from the plain meaning of the statute or from its history, the Court will follow that intent.

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[4] Throughout its brief, the State insists that this Court "must" assume that Pharmacia knowingly caused to be made false statements of material fact for use in determining rights to Medicaid payments. (Cross Appeal Brief ("CAB") at 25.) However, whether an enforcement or damages claim can be predicated on budgetary decisions made by the legislature in the biennial budget, whether AWPs can be "false" when AWPs were precisely what the legislature understood them to be, and whether the State's claims violate the constitutionally required separation of powers have not been determined in this appeal. The issues on which this Court has granted review concern whether the State can pursue a damages claim based on the legislature's decisions, whether the State had a right to a jury for its two statutory claims, whether the trial court could supply an answer to a verdict question more than 90 days after verdict and on a theory never argued to the jury, and the correct interpretation of § 49.49(4m). None of these issues requires the assumption that the State advocates.

See, e.g., Ladner v. United States, 358 U.S. 169, 173-76 (1958); *State v. Mosley*, 102 Wis. 2d 636, 645, 307 N.W.2d 200 (1981).

1. *As a Forfeiture Statute, Wis. Stat. § 49.49(4m) Will Be Construed Strictly Against the State.*

Forfeitures are disfavored in the law, and statutes imposing them will be construed strictly against the State. *State v. James*, 47 Wis. 2d 600, 602, 177 N.W.2d 864 (1970); *State v. Baye*, 181 Wis. 2d 334, 339-40, 528 N.W.2d 81 (Ct. App. 1995).

This Court has also noted the strong public policy in favor of strict construction of penal statutes:

> This canon of strict construction is grounded on two public policies. The first favors notice as to what conduct is [proscribed]. The second recognizes that since the power to declare what conduct is subject to penal sanctions is legislative rather than judicial, it would risk judicial usurpation of the legislative function for a court to enforce a penalty where the legislature has not clearly and unequivocally prescribed it.

State v. Christensen, 110 Wis. 2d 538, 546-47, 329 N.W.2d 382 (1983) (internal citation and quotation marks omitted).

The State argues that strict construction of a penal statute is not appropriate if it would defeat the legislative intent. (CAB

at 27-28.) The State cites *State v. Kittilstad*, 231 Wis. 2d 245, 262, 603 N.W.2d 732 (1999), for this proposition, but fails to explain why strict construction is not appropriate here or why the legislative intent behind § 49.49(4m) would be contrary to strict construction. (CAB at 27.) Unlike the facts and the statute at issue in *Kittilstad*, the State's forfeiture theory in this case is not plainly within the "reaches of the conduct contemplated by the statute." *Kittilstad*, 231 Wis. 2d at 262.[5]

2. *Wis. Stat. § 49.49(4m)(b) Allows a Forfeiture for Each Statement of Fact by the Defendant that Violates Wis. Stat. § 49.49(4m)(a), Not for Each Subsequent Use by the Plaintiff of Each Such Statement.*

Wis. Stat. § 49.49(4m)(a)2 provides that "[n]o person, in connection with medical assistance, may . . . [k]nowingly make or cause to be made any false statement or representation of a material fact for use in determining rights to a . . . payment." Section 49.49(4m)(b) provides that a person who violates the

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[5] Further, this Court should not even consider this argument because of the State's failure to explain its application to this case. *Kristi L.M. v. Dennis E.M.*, 2007 WI 85, ¶20 n.7, 302 Wis. 2d 185, 734 N.W.2d 375 (stating that undeveloped arguments will not be considered by court).

statute "may be required to forfeit not less than $100 nor more than $15,000 **for each statement [or] representation.**" Wis. Stat. § 49.49(4m)(b) (emphasis supplied).

The appropriate unit of prosecution under § 49.49(4m) is each statement that satisfies the requirements of § 49.49(4m)(a), *i.e.*, was one of material fact, false, knowingly made or caused to be made by the defendant, and for use in determining a provider's right to payment. If the legislature had wanted to base forfeitures on the number of times the State **used** a single statement, it could and would have done so. *See Brauneis v. Wis. Labor & Indus. Review Comm'n*, 2000 WI 69, ¶27, 236 Wis. 2d 27, 612 N.W.2d 635 (stating that court will not read into statute what is not there). However, that is not what the statute says. *Rechsteiner v. Hazelden*, 2008 WI 97, ¶29 n.5, 313 Wis. 2d 542, 753 N.W.2d 496 ("[T]he court will interpret the statute as written.").

The State's argument is further refuted by the legislature's decision to proscribe in § 49.49(4m)(a)2 a statement "**for use in**

determining rights to a . . . payment." Wis. Stat. § 49.49(4m)(a)2 (emphasis supplied). The language clearly indicates that one statement might be used multiple times; otherwise, the words "for use" would be superfluous and the statute will not be construed in that fashion. *Wis. Dep't of Revenue v. River City Refuse Removal, Inc.*, 2007 WI 27, ¶45, 299 Wis. 2d 561, 729 N.W.2d 396 (explaining that court will "avoid a construction of a statute that would result in words being superfluous"). When read together, §§ 49.49(4m)(a)2 and 49.49(4m)(b) make clear that a forfeiture may be imposed for each statement, not each use. *State v. Fischer*, 2010 WI 6, ¶24, 322 Wis. 2d 265, 778 N.W.2d 629 (noting that "purpose of statutory interpretation is to determine what statute means so that it may be given its full, proper and intended effect").

The State contends that its position is supported by the legislative history and purpose of § 49.49(4m). (CAB at 24-25.) It bases this contention on the assertion that § 49.49(4m), "[w]hen enacted . . . was the sole remedy for the prohibited conduct" and

that "it was exclusively through the assessment of forfeitures that the legislature originally meant to deter the proscribed Medicaid fraud." (CAB at 24.)

Even if this were accurate, the fact that § 49.49(4m) was enacted to deter Medicaid fraud does not change the way in which the legislature chose to effectuate its purpose: by allowing forfeitures for representations that violate the statute, not by allowing forfeitures for each time Medicaid acts on such a representation. Moreover, the State's assertion that the legislature enacted § 49.49(4m) as "the sole remedy for the prohibited conduct[,]" is not accurate. (CAB at 24.) Wisconsin enacted § 49.49 in 1977. (Wis. Stat. § 49.49 (enacted 1977).) Section 49.49(1) provided criminal penalties for the identical conduct covered by § 49.49(4m). *Compare* § 49.49(1)(a) *with* § 49.49(4m)(a). Years later, § 49.49(4m) was drafted at the request of the Department of Justice ("DOJ"). (C.Resp.Ap. at 127-128.) The DOJ's Medicaid Fraud Control Unit Director explained its purpose: "the state would not be limited to charging

providers who commit these acts with crimes but would allow the state, in the appropriate case, the ability to ask for the substantially less serious civil sanction of forfeiture rather than a criminal conviction or nothing." (C.Resp.Ap. at 129.) Thus, § 49.49(4m) was created to offer far more limited penalties, and was directed at providers. It was not intended to be "the sole remedy for prohibited conduct." (CAB at 24; *see also* C.Resp.Ap. at 131-41; C.Resp.Ap. at 142.)

3. *Wis. Stat. § 49.49(4m) Permits Forfeitures Only For Statements Used in Determining the Right to Payment, Not the Amount of that Payment.*

The State has alleged that the AWPs were "inflated" and caused Medicaid to "overpay" pharmacists for certain prescription drugs; it does not assert that Pharmacia caused Medicaid to pay a pharmacist who did not have a right to receive payment.

It is well-settled that a court "must presume that a legislature says in a statute what it means and means in a statute what it says there," and "that every word excluded from a statute . . . [was] excluded for a purpose." *Heritage Farms, Inc. v. Markel Ins. Co.*, 2009 WI 27, ¶14 n.9, 316 Wis. 2d 47, 762 N.W.2d

652 (internal citations and quotation marks omitted). In § 49.49, the legislature made a clear distinction between fraudulent conduct for use "in determining *rights*" to a Medicaid benefit or payment, § 49.49(1)(a)2 (emphasis supplied), and conduct to secure benefits or payments "in a greater amount or quantity than is due," § 49.49(1)(a)3. Section 49.49(4m)(a)2 addresses only the former, and not the latter. In fact, its language mirrors that of § 49.49(1)(a)2, and allows for penalties to be imposed for a "false statement or representation of a material fact for use in determining rights to [a] benefit or payment." The legislature could have chosen to impose forfeitures for fraudulent conduct to secure benefits or payments "in a greater amount or quantity than is due," but it did not. Wis. Stat. § 49.49(1)(a)3.

4. *The State's Theory Is Contrary to Caselaw Concerning Counting of Forfeitures.*

Double forfeitures for the same conduct are not allowed. *State v. Braun,* 103 Wis. 2d 617, 630, 309 N.W.2d 875 (Ct. App. 1981) ("A person cannot be subject to a double forfeiture if his conduct constituted a single violation[.]"); *State v. Menard, Inc.,*

121 Wis. 2d 199, 202, 358 N.W.2d 813 (Ct. App. 1984). As part of this prohibition, Wisconsin law requires that a defendant have made a distinct volitional choice for each forfeiture. *Menard,* 121 Wis. 2d at 202-03.

There are no Wisconsin cases interpreting how violations should be counted under § 49.49(4m). However, as the trial court explained, *Menard*, "while not precisely on point, is the closest Wisconsin authority." (A.Ap. at 90; *see also* C.Resp.Ap. at 155 (acknowledging that *Menard* is not directly on point).) Although *Menard* does not deal with the specific issue before this Court, it provides sound analysis on how violations should be counted to prevent multiple forfeitures from being imposed for the same conduct. *See, e.g., Menard*, 121 Wis. 2d at 202-04.

In *Menard*, the Court of Appeals considered this issue of what constituted a separate violation for which a forfeiture could be imposed under Wis. Stat. § 100.26(6). *Menard*, 121 Wis. 2d at

201.[6] At issue were eight "distinct advertisements" that had been published in multiple editions of various newspapers throughout Wisconsin. *Id.* at 201-02. The trial court held that each advertisement constituted a single violation, and the State appealed, arguing that "each publication of an improper advertisement constitutes a separate violation." *Id.* at 201. The Court of Appeals adopted the State's reasoning because "[p]ublishing the same advertisement in different newspapers requires independent acts. Similarly, running an advertisement in consecutive editions involves separate choices. Prosecuting each publication as a separate offense does not constitute multiple charges because of these independent acts." *Id.* at 202-03 (emphasis supplied). As the Court of Appeals made clear, the focus is on the defendant's conduct, *i.e.*, "independent acts" or "separate choices," because it is those acts that violate the statute and subject the defendant to forfeitures.

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[6] Wis. Stat. § 100.26(6) "requires a forfeiture of not less than $100 nor more than $10,000 for each violation of an order issued under [Wis. Stat. §] 100.20(2)." *Menard*, 121 Wis. 2d at 202.

In this case, the State is essentially asking that a forfeiture be imposed not for each publication, but for each time the publication was read or relied upon. (CAB at 29.) If this theory were applied to *Menard*, then the defendant in *Menard* would have been assessed a forfeiture for each time each copy of each newspaper that carried the advertisements was read. (*See, e.g.*, A.Ap. at 90.) Such a theory would result in multiple forfeitures for the same conduct and is completely at odds with the *Menard* court's focus on the defendant's independent acts and separate choices so as to avoid the imposition of double forfeitures for the same conduct. *See Menard*, 121 Wis. 2d at 202-03. In fact, under the State's theory, multiple forfeitures (possibly hundreds or thousands) could be based on the same conduct.[7] As the trial court correctly noted, *Menard* stands for the proposition that

[7] The State argues that *Menard* is inapplicable because in that case the State did not argue that each newspaper sold should constitute a separate violation. (CAB at 29.) This argument is misplaced, because the court did consider whether the size of the audience mattered. *Menard,* 121 Wis. 2d at 203-04. In response to due process and equal protection claims by the defendant, the court clarified that "[t]reating each publication as a separate violation is reasonable because the audience size exposed to an improper price comparison is not intended to define a violation" and "[p]ublishing the advertisement, irrespective of the audience size, constitutes the violation." (*Id.*)

Pharmacia may only be subjected to forfeitures "for each false material statement or representation it made or caused to be made, not each time someone looked at it, or even relied on it." (A.Ap. at 90.)

Federal cases addressing how to count violations for forfeitures under the federal False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3333 (2011), also focus on the defendant's conduct. For example, in *United States v. Bornstein*, 423 U.S. 303 (1976), the defendant was a subcontractor. *Id.* at 307. The general contractor incorporated three separately invoiced shipments of falsely labeled radio kit components from the subcontractor into products shipped to the federal government. *Id.* at 307-08. The general contractor billed the government for the falsely labeled kits in 35 separate invoices. *Id.* The government sought to impose on the subcontractor a forfeiture for each of the 35 false invoices sent by the general contractor. *Id.* Although the three fraudulent acts of the subcontractor resulted in the general contractor submitting 35 false claims, the Supreme Court held

that the government could recover only for the three subcontractor invoices to the general contractor, because the FCA "penalizes a person for his own acts, not for the acts of someone else." *Id.* at 311-13. "The fact that [the general contractor] chose to submit 35 false claims instead of some other number was, so far as [the subcontractor] was concerned, wholly irrelevant completely fortuitous and beyond [the subcontractor's] knowledge or control." *Id.* at 312.

In rejecting the government's foreseeability argument for a higher number of forfeitures, the Supreme Court explained:

> The Government suggests that [the subcontractor] assumed the risk that [the general contractor] might send 35 invoices. . . . The statute, however, does not penalize [the subcontractor] for what [the general contractor] did. It penalizes [the subcontractor] for what *it* did.

Id. at 312 (emphasis in original).

Bornstein and its progeny make clear that the only acts appropriate for consideration are those of the defendant, not the consequences of those acts, even if they were foreseeable. *See, e.g., United States v. Krizek*, 111 F.3d 934, 939 (D.C. Cir. 1997);

U.S. ex rel. Longhi v. Lithium Power Techs., Inc., 530 F.Supp. 2d 888, 900-01 (S.D. Tex. 2008). The "focus in each case [must] be upon the specific conduct of the person from whom the Government seeks to collect the statutory forfeitures." *Bornstein*, 423 U.S. at 313.

The State asks this Court to follow a "foreseeability" approach in construing § 49.49(4m)(b). (CAB at 30-38.) However, the *Bornstein* court expressly refused to apply the precise foreseeability analysis the State advocates. While the State asserts that certain federal courts have taken a "foreseeability" approach in construing federal false claims statutes (*id.*), none of the cases holds that penalties can be imposed based on the "foreseeable" consequences of a defendant's actions. Indeed, like *Bornstein*, they reject that notion.

For example, the State relies heavily on the Ninth Circuit's decision in *United States v. Ehrlich*, 643 F.2d 634 (9th Cir. 1981). (CAB at 30-38.) There, a divided panel of the Ninth Circuit held that the general partner of a mortgagor whose interest on a

fraudulently inflated loan was subsidized by HUD could be held liable for each monthly claim that the mortgagee filed with HUD, rather than for the general partner's one act of inflating construction costs. *Ehrlich*, 643 F.2d at 637-38. Relying on *Bornstein*, the panel majority explained that

> if a person knowingly causes a specific number of false claims to be filed, he is liable for an equal number of forfeitures. In the absence of such knowledge, using the number of claims to determine the number of forfeitures would be arbitrary. Where such knowledge is present, however, it is consistent with the purposes of the [FCA] to impose forfeitures based on the number of claims.

Id. at 638. Because the mortgagor "knew that a false claim would be submitted each month[,] . . . could have prevented the filing of additional false claims[,] . . . did nothing and gained a continuing benefit" the court did not limit his liability to his one act. *Id.* at 638. The issue was not one of foreseeability, but one of "knowledge and control of the situation." *Id.* The defendant had actual knowledge that a particular number of claims would be filed, the ability to stop a particular claim from being filed, and received a benefit from each claim that was filed. Put differently,

penalties were imposed based on the defendant's conduct, not based on the victim's actions.

The State is silent on the manner in which *Bornstein* and *Ehrlich* have been construed, other than to claim in a footnote that *Ehrlich* was followed in *United States v. Incorporated Village of Island Park*, 888 F. Supp. 419, 441 (E.D.N.Y. 1995). (CAB at 32 n.6.) However, even in *Island Park*, the court recognized the need to measure the number of fraudulent acts committed by the defendant, and applied *Erlich's* analysis because the defendant caused a "readily ascertainable number of claims" to be submitted. *Island Park*, 888 F.Supp. at 441. Thus, the court's decision in *Island Park* was based not on "foreseeability," but instead upon the defendant's specific knowledge and control. Courts have refused to apply the expansive approach that the State advocates. *See, e.g., Hays v. Hoffman*, 325 F.3d 982, 993-94 (8th Cir. 2003) (noting in context of conduct giving rise to large number of false Medicaid claims that, under *Bornstein*, defendant would only be liable for eight forfeitures); *United States v. Krizek*,

111 F.3d at 940 ("The question turns, not on how the government chooses to process the claim, but on how many times the defendant made a 'request or demand.'").

Moreover, the State's request to count forfeitures based on the number of claims processed by Medicaid would cause multiple forfeitures to be imposed for the same conduct and penalize Pharmacia for conduct that was not its own. There is no legal basis for doing so. *See, e.g., Menard*, 121 Wis. 2d at 202-03; *Bornstein*, 423 U.S. at 529; *Ehrlich*, 643 F.2d at 638. Accordingly, this Court should reject the State's theory of counting violations under Wis. Stat. § 49.49(4m).

B. THE STATE'S USE OF AWP AS A DATA ELEMENT IN A COMPUTER PROGRAM IS NOT A VIOLATION OF WIS. STAT. § 49.49(4m)(a)2 AND CANNOT BE THE BASIS FOR FORFEITURES.

1. *The State's Use of AWP in a Computer Program Is Not a "New Statement."*

The State's theory is that, when EDS processes a pharmacist's claim for reimbursement, the Medicaid computer system makes a "false statement" to itself. (CAB at 5-6, 11, 22-23.) The alleged victim's use of its own computer program

does not equate to the defendant making a statement of fact any more than an alleged victim repeatedly looking in a book for that same number equates with repeated false statements. There is a clear difference between providing information and the subsequent use of that same information; it is not a new statement, it is just the same statement being reviewed more than once. Indeed, the State continues to reimburse for drugs that were manufactured by settling defendants based on AWP. (R.312 at 28-51; C.Resp.Ap. at 123; R.443 at 148:6-16.) The State would doubtless deny that its computer program is "generating false statements of fact" as it processes Medicaid claims for those drugs.

As a matter of law, the State cannot show that its own use of AWPs in calculating reimbursement falls within § 49.49(4m)(a)2. Accordingly, such use cannot carry a forfeiture under § 49.49(4m)(b).

2. *When AWP Is Used By a Computer Program, It Is Not a Statement of Fact.*

"Statement of fact" is not defined in § 49.49(4m). However, the Court will construe undefined statutory terms in a common sense manner. *State v. Polashek*, 2002 WI 74, ¶19, 253 Wis. 2d 527, 646 N.W.2d 330; *State v. Strong*, 2011 WI App 43, ¶10, 332 Wis. 2d 554, 796 N.W.2d 438.

BLACK'S LAW DICTIONARY 1540 (9th ed. 2009) defines a "statement of fact" as "[a] form of conduct that asserts or implies the existence or nonexistence of a fact." *Cf. State v. Chrysler Outboard Corp.*, 219 Wis. 2d 130, 168, 580 N.W.2d 203 (1998) (consulting BLACK'S to determine meaning of undefined term in forfeiture statute). The common sense meaning of "statement of fact" is that it is made by one person to another, not by one person to himself. The latter situation is simply repeating what may have, at an earlier temporal point, been a statement of fact.

The State's theory as to what constitutes a "statement of fact" is particularly off the mark in the context of this case. When used in connection with computers, the term "statement"

means something entirely different than "statement of fact." *See* Microsoft Computer Dictionary 497 (Sandra Haynes, ed., 5th ed. 2002) (defining "statement" as "[t]he smallest executable entity within a programming language"). (C.Resp.Ap. at 160.) When used as an "element" in Medicaid reimbursement formulas (C.Resp.Ap. at 22-41), AWP neither asserts nor implies the use of an actual wholesale price. In fact, the State's EAC is set at a double-digit discount from AWP precisely because the legislature knows that AWPs do not represent actual wholesale prices. (C.Resp.Ap. at 162; R.441 at 86:24-25 ("We wouldn't have been discounting otherwise.").)[8]

3. *Pharmacia Did Not "Knowingly Cause" Medicaid's Computer System to Make False Statements to Itself.*

The trial court concluded that Pharmacia "caused" First DataBank to provide AWPs to Medicaid and found a violation of § 49.49(4m) each time First DataBank provided an AWP that

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8 The State's position that AWPs are "statements of fact" also is contrary to the agreement between EDS and First DataBank. That agreement makes clear that there are no representations as to the accuracy of any data in that database (C.Resp.Ap. at 1-21), and precludes any notion that AWPs purport to be statements or representations of what actual average prices are.

Medicaid used at least once for reimbursement purposes. (A.Ap. at 93-102.)[9] The State asks this Court to take several more leaps in logic to conclude that Pharmacia "caused" EDS's computer system to make statements to itself.

Because § 49.49(4m) does not define what it means to "cause" a statement to be made, this Court will apply normal principles of statutory construction to determine its meaning. *Chrysler*, 219 Wis. 2d at 168-69. In *Chrysler*, this Court considered the language of Wis. Stat. § 144.76, which imposed liability on persons who "cause a hazardous discharge." *Chrysler*, 219 Wis. 2d at 140-41. The Court noted that the term "cause" could be reasonably understood in more than one way, considered the legal dictionary definition of "cause," and ultimately concluded, after analyzing the legislative history of the environmental statute at issue, that Chrysler "caused" a spill when it failed to remediate. *Id.* at 168-73.

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9 The trial court's competence to do so more than 90 days after verdict and on a theory not submitted to the jury is a subject of Pharmacia's appeal. (AB at 49-50.)

Crucial to the *Chrysler* court's analysis was the fact that § 144.76 did not require the hazard to have been "knowingly" caused. *Id.* at 170-71. In contrast, § 49.49(4m) contains the express requirement that a defendant have "knowingly" caused a particular statement to be made.

In enacting § 49.49(4m)(a)2, the legislature did not provide that prohibited conduct included "indirectly" causing a statement to be made. When it wishes to do so, the legislature enacts statutes that govern "indirect" conduct. *See, e.g.*, Wis. Stat. § 12.08 (2011) (providing that "[n]o person may, directly or indirectly, cause any person" to make contributions); Wis. Stat. § 551.502(1) (2011) (prohibiting provision of fraudulent investment advice "directly or indirectly or through publications or writings"); Wis. Stat. § 100.18(1) (2011) (providing that no person may "cause, directly or indirectly" dissemination of fraudulent representations). The legislature knows how to regulate conduct that is more than one step removed from the original actor. When it does so, it typically does not include a

requirement for scienter. *See, e.g.*, §§ 12.08, 551.502(1), and 100.18(1). In contrast, when it enacted § 49.49(4m), the legislature did require scienter and did not include language providing for causation that was more than one step removed from the original actor.

The State's theory is also inconsistent with federal cases that have interpreted what it means to "cause" something to occur. For example, in *United States v. President & Fellows of Harvard College*, 323 F.Supp. 2d 151, 186-87 (D. Mass. 2004), the district court explained that, to "cause" the presentation of a false claim, a defendant must have participated in the claims process. In *Island Park*, 888 F.Supp. at 437-39, a principal was found to have "caused" its agent to submit false claims.[10] In *United States v. Krizek*, 111 F.3d 934, 942 (D.C. Cir. 1997), a defendant "caused" a false claim to be submitted when he delegated to his wife the authority to submit claims on his behalf, but did not

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10 The State never argued or offered proof at trial that Pharmacia had an agency relationship with First DataBank. Indeed, because First DataBank supplied AWPs for all manufacturers (A.Ap. at 39-41), an agency relationship would be impossible.

review them himself. And in *United States v. Mackby*, 261 F.3d 821, 828 (9th Cir. 2001), a defendant "caused" a false claim to be submitted when he gave instructions about how to submit the claim. None of those situations is presented here.

The State does not dispute that drug manufacturers' conduct is at least two steps removed from pharmacy reimbursement based on AWP. (CAB at 32.) In fact, it is many more steps removed. The following must occur before a claim is processed based on a discount from AWP:

1. The Wisconsin legislature must decide to use AWPs in the next biennial budget and the discount it will apply to AWPs in order to calculate EAC;
2. A manufacturer must provide its list price information to First DataBank;
3. First DataBank must calculate and provide AWPs to EDS;
4. A doctor must prescribe a manufacturer's drug to a Medicaid patient;
5. The pharmacist must fill the prescription;
6. The pharmacist must submit the claim for reimbursement;

7. The submitted "usual & customary" charges by the pharmacist must be higher than the State's AWP-based EAC; and

8. The State must not have a MAC lower than the AWP-based EAC.

Only after all of the above steps does the claim processing occur that the State contends forms a basis for a right to a forfeiture. The State has no credible argument that manufacturers "knowingly caused" the legislature to set the reimbursement formula, a doctor to prescribe a particular manufacturer's drug, or the pharmacist to fill the prescription and submit the claim for reimbursement.

The State's theory impermissibly reads out of § 49.49(4m) the requirement of scienter. It also is inconsistent with the verdict question to which the State did not object at trial, which asked the jury how many false statements Pharmacia "knowingly caused to be made." (A.Ap. at 69.) During this appeal, the State tried to defend the jury's answer to Verdict Question 5 by arguing that "knowingly" only applied to "falsity," *i.e.*, that it only needed to prove that Pharmacia knew AWPs were not actual wholesale

prices and could then recover a forfeiture for every time AWPs were used in reimbursement. (C.Resp.Ap. at 165.) However, under Wisconsin principles of statutory construction, "knowingly" modifies "caused." *See, e.g., State v. Sterzinger*, 2002 WI App 171, ¶ 11, 256 Wis. 2d 925, 649 N.W.2d 677 (holding that "knowingly" modified clause immediately following it in statute at issue); *State v. Williams*, 179 Wis. 2d 80, 89, 505 N.W.2d 468 (Ct. App. 1993) (noting that § 49.49 "requires an intent to make or cause to be made a false statement"). Thus, a defendant cannot be subject to a forfeiture for a statement unless the State proves that the defendant actually knew it caused that particular statement to be made.

C. THE STATE WAIVED THE ABILITY TO PURSUE FORFEITURES ON THE THEORY IT OFFERS TO THIS COURT.

The State's forfeiture theory has been a moving target. In each of its Complaints, the State demanded a forfeiture for each AWP that a defendant reported. (A.Ap. at 1-22, 23-58; R.6; R.68.) Prior to trial, the State's theory shifted, and it claimed that "each time Pharmacia reported a false price, it caused a false statement

of fact to be made in a provider's application for reimbursement." (C.Resp.Ap. at 169.) That theory failed when a State witness testified that providers do not put AWPs in their applications. (A.Ap. at 298-99.) As the trial court noted, the State failed to offer any significant proof of the number of statements Pharmacia made to First DataBank regarding AWP, or the number of such statements First DataBank made to Wisconsin Medicaid. (A.Ap. at 94.) Moreover, the State never presented to the jury its current theory about the Medicaid computer program making statements to itself, but simply asked the jury to answer Verdict Question No. 5 in the manner that the trial court had rejected. (A.Ap. at 460-61; R.441 at 108:23-109:15.)

These decisions preclude the State from obtaining reversal of the trial court's decision regarding the number of forfeitures. The State only pleaded a claim for forfeitures for each AWP reported by a defendant. (A.Ap. at 56.) Under Wis. Stat. § 778.02, the State was required, in its Complaint, to "specify the particular offense or delinquency for which the action is brought."

The State never amended its request for relief to seek a forfeiture for each time the State reimbursed a pharmacist. The State was fully aware of this requirement; indeed, it sought leave of court to file an "amended forfeiture count" once the trial court vacated the answer to Verdict Question No. 5. (R.348.) However, even when it did so, the State did not seek to amend in order to pursue the forfeiture claim it now seeks. The requirement of § 778.02 defeats the State's attempt to now recover forfeitures on a different theory.

Moreover, the State did not object when the trial court rejected the State's requests for a jury instruction and verdict question tying the number of violations of § 49.49(4m) to the number of claims that were reimbursed. That constitutes a waiver of the issue under Wis. Stat. § 805.13(3), which provides

that "[f]ailure to object at the conference constitutes a waiver of any error in the proposed instructions or verdict."[11]

The State waived its claim and this Court should not salvage it.

D. THE STATE FAILED TO PROVE ITS FORFEITURE CLAIM AGAINST PHARMACIA.

1. *The Court Should Reject the State's Assertions and Arguments About "Marketing the Spread."*

The State devotes much of its brief to attacking what it claims were Pharmacia's marketing practices. (CAB at 7-9, 35-37.) In addition to being unrelated to the certified question, these arguments misrepresent the facts, and are wholly illogical in light of the realities of Medicaid reimbursement. Indeed, they are contrary to the State's admissions to the trial court and Court of Appeals that those practices do not violate § 49.49(4m) (C.Resp.Ap. at 175; C.Resp.Ap. at 164), and are refuted by the State's admission that it had no evidence that such practices ever

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[11] The State suggests that Pharmacia should have objected to the State's forfeiture theory or offered one of its own. (CAB at 12.) However, as the party asserting the forfeiture claim, it was incumbent on the State to plead and prove it. Pharmacia was under no obligation to object when the State asked the jury during closing argument to answer a question that was not on the verdict form.

occurred in Wisconsin (C.Resp.Ap. at 178-79; R.430 at 63:15-64:23).

Even though "marketing the spread" was a central theme in each of the State's Complaints (*e.g.*, A.Ap. at 23-58), the State refused during discovery to disclose whether it actually happened in Wisconsin: "[i]t does not make a difference whether [any] Pharmacist was motivated by the spread" and "[w]hether or not the Pharmacist is motivated by the profit offered to him or her . . . is not relevant." (C.Resp.Ap. at 181; *see also* C.Resp.Ap. at 178-79; R.430 at 63:15-64:23.) When ordered to respond to discovery requests (C.Resp.Ap. at 190), the State admitted it had no evidence that any provider located in Wisconsin chose a Pharmacia drug because of the spread (C.Resp.Ap. at 178-79; R.430 at 63:15-64:23). At trial, the State offered no evidence of any communication between Pharmacia and any Wisconsin doctor or pharmacist.

The State's claimed "extensive evidence" (CAB at 6-9) is the following:

a. A 1993 Upjohn Company memo discussing margins and AWPs. (CA.Ap. at 73.)[12] The document said nothing about Wisconsin, and Medicaid was not reimbursing for Upjohn drugs based on AWPs at that time. (A.Ap. at 264-70; A.Ap. at 272-74.)

b. A 1999 e-mail that discussed pharmacists' resistance to stocking product. (CA.Ap at 74-78.) It said nothing about Wisconsin.

c. A 1995 Upjohn memo discussing "Xanax® Medicaid Opportunities." (CA.Ap. at 79-89.) Wisconsin did not reimburse for Upjohn drugs at that time based on AWP. (A.Ap. at 264-70; A.Ap. at 272-74.) The State offered no evidence that any provider in Wisconsin was actually approached about Xanax and admits that it knew of none who made a decision to buy or prescribe Xanax based on any "spread." (C.Resp.Ap. at 178-79; R.430 at 63:15-64:23.)

d. Two worksheets relating to each of two 1997 contract proposals for Pharmacia and Upjohn. (CA.Ap. at 90-93.) Neither was with a Wisconsin customer and, in any event, Medicaid did not reimburse for Pharmacia and Upjohn drugs based on AWP in 1997. (A.Ap. at 268, 281-82, 378-82, 402.) Further, the witnesses through whom the State offered the exhibits had no personal knowledge of them, and the State never even demonstrated that the proposals had been sent to anyone outside of the company. (*See, e.g.,* C.Resp.Ap. at 193-94.)

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12 References to "CA.Ap." are cites to the Cross-Appellant's Appendix.

e. Scattered documents from Pharmacia's subsidiary Greenstone. (CA.Ap. at 94-101.) Greenstone sells generic drugs and, with rare and short-term exceptions, Medicaid does not reimburse for generics based on AWPs. (A.Ap. at 296-97; R.436 at 66:16-67:22; C.Resp.Ap. at 96.)

f. An unsigned copy of a 1997 letter to "American Oncology Resources" in Houston, Texas, discussing possible "opportunities" and looking forward to future discussions. (CA.Ap. at 102-05.) The State's liability expert had no idea if it had ever been sent (C.Resp.Ap. at 196-200; R.434 at 185:13-189:4), and, in any event, it does not relate to Wisconsin.

Thus, of the documents that the State claims constitutes "extensive evidence," most are from the 1990s and none was sent to or received by anyone in Wisconsin. Further, the documents concerning branded drugs were created at a time when Medicaid did not reimburse for those drugs based on AWPs, and the remaining documents were about generic drugs, for which

Wisconsin typically reimbursed based on MACs that it set without regard to published prices.[13]

Finally, after trial, the State conceded in post-verdict motions that "marketing the spread" would not violate Wis. Stat. § 49.49(4m). (C.Resp.Ap. at 175.) It repeated that concession to the Court of Appeals. (C.Resp.Ap. at 164.) There is no Wisconsin authority, and the State has not cited any, allowing forfeitures to be imposed absent a violation of a law. Any attempt by the State to now argue to the contrary should be rejected.

2. *The Court Should Disregard the State's Misstated and Unsupported Factual Assertions.*

The State's brief is replete with unsupported (and unsupportable) factual assertions. (CAB at 6-7, 16, 19-20, 32, 34.) For example:

- The State claims that Pharmacia knew that "all" of its AWPs that were generated in processing claims were

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13 In addition, the State argues that "Pharmacia used enormous spreads on its generic and post-patent brand drugs to market those drugs to providers." (CAB at 9.) Aside from the fact that the State did not present a single shred of evidence that a single Wisconsin pharmacist was encouraged to or did buy a Pharmacia product on this basis, the State fails to point out that, if Wisconsin pharmacists could make a profit on such drugs, it was because of the markup that **Medicaid** applied to the **actual prices** that Wisconsin pharmacists paid. (A.Ap. at 297-98; R.436 at 67:2-68:14.)

false prices. (CAB at 6.) The authority for that proposition is a 1995 Upjohn interoffice memo by a person who offered an informal definition of AWP as "fabricated." (*Id.* at 7.) The document does not speak to corporate understanding over the period between 1994 and trial in 2009, and does not concern claims processing.

- The State claims that Pharmacia had knowledge about Wisconsin's Medicaid reimbursement formula and that it "knew" that AWPs would be filled into the formula. (*Id.* at 7.) The transcript on which the State's argument is based was not about Wisconsin and did not concern claims processing. (CA.Ap. at 57-59, 70, 72.)

- In perhaps its most serious misrepresentation, the State argues that "Pharmacia. . . intended that its false AWPs would be generated each time Wisconsin Medicaid processed a claim for its drug." (CAB at 7; *see also id.* at 35-37.) There is **no** evidence to support that assertion or the argument based on it.

These misstatements and unsupported factual assertions are the very basis for the State's arguments.

3. *The State Failed to Prove Its Assertion that Pharmacia Intended to Increase the Number of Statements Made When EDS Processed Reimbursement Claims.*

The State claims that Pharmacia "intended to increase the number of statements" that were generated when EDS processed a claim for reimbursement. (CAB at 35-37.) However, there is no

suggestion, much less evidence, that Pharmacia intended to increase the number of times that Medicaid reimbursed for Pharmacia drugs based on a discount from AWP. The only document that even mentions Wisconsin was the 1995 Upjohn document concerning Xanax (CA.Ap. at 79-89), and Wisconsin was not reimbursing for Upjohn branded drugs in 1995 based on AWPs (A.Ap. at 268, 281-82, 378-82, 402). Based on its mischaracterization of a smattering of documents, the State wants this Court to accept that Pharmacia, beginning in 1994 and continuing through 2006, intended to increase the number of times that Medicaid reimbursed pharmacists for dispensing Pharmacia drugs based on a discount from AWP, even though (a) until 2000, Medicaid did not even reimburse for most of Pharmacia's branded drugs based on a discount from AWP (*id.*); (b) Pharmacia's generic drugs were almost always reimbursed based on MACs, rather than AWPs (CA.Ap. at 291-95); and (c) the only reason for having an AWP set for generics was to

keep them from being classified as branded drugs. (A.Ap. at 256-57.)

Wholly missing from the State's brief and from trial is any proof that:

- Pharmacia was aware of Wisconsin pharmacists' purchases of Pharmacia drugs, much less the drugs that were being submitted to Medicaid for reimbursement (other than after the fact for purposes of paying rebates to the federal government and Wisconsin);[14]
- Pharmacia knew the prices that Wisconsin pharmacists paid wholesalers to buy Pharmacia drugs. The sole evidence at trial was that it had no such knowledge. (C.Resp.Ap. at 202-03; R.438 at 85:4-86:8); or
- Pharmacia ever communicated with Medicaid or EDS about claims processing, much less the processing of any individual claim.

Perhaps because the State did not anticipate that the trial court would reject its proposed instruction and verdict form (A.Ap. at 464-67; R.266), the State simply asked the jury to answer the question that the trial court had rejected. However, it

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[14] As a matter of law, Pharmacia could not have known that a claim was being submitted because state and federal law require such information to be confidential. 42 U.S.C. §§ 1320d-1 to d-7 (2011); Wis. Stat. § 153.50 (2011). Thus, what the State asserts is the "statement" for which a drug manufacturer should be penalized—the processing of an individual claim—occurs without Pharmacia ever knowing about it.

had never proved that Pharmacia knowingly caused even one claim to be processed using AWP, much less 1.4 million of them.

CONCLUSION

This case has nothing to do with preventing or punishing fraud. The State's claims are based on budgetary decisions by the Wisconsin legislature, made with a full understanding of the supposed deception, and the forfeiture theory is contrary to the law, the facts, and any notion of ordinary common sense. The cross-appeal should be dismissed.

Dated this 22nd day of September, 2011.

By: _____

O. Thomas Armstrong, SBN 1016529
Beth J. Kushner, SBN 1008591
Douglas M. Raines, SBN 1059539
VON BRIESEN & ROPER, S.C.
411 East Wisconsin Ave., Suite 700
Milwaukee, WI 53202
Tel: (414) 276-1122
Fax: (414) 276-6281

John C. Dodds
Erica Smith-Klocek
Máire E. Donovan
MORGAN, LEWIS & BOCKIUS LLP
1701 Market Street
Philadelphia, PA 19103-2921
Tel: (215) 963-5000
Fax: (215) 963-5001

John Clayton Everett, Jr.
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue
Washington, DC 20004
Tel: (202) 739-3000
Fax: (202) 739-3001

Attorneys for Pharmacia Corporation

CERTIFICATION

I hereby certify that this brief conforms to the rules contained in § 809.19(8)(b) and (c), WIS. STATS., for a brief and appendix produced with a proportional serif font. The length of this brief is 9,259 words.

Dated this 22nd day of September, 2011.

By: _____

Beth Kushner, SBN 1008591
O. Thomas Armstrong, SBN 1016529
Douglas M. Raines, SBN 1059539
VON BRIESEN & ROPER, S.C.
411 East Wisconsin Ave., Suite 700
Milwaukee, WI 53202
Tel: (414) 276-1122
Fax: (414) 276-6281

CERTIFICATION

I hereby certify that:

I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of § 809.19(12) WIS. STATS. I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 22nd day of September, 2011.

By: _____

Beth Kushner, SBN 1008591
O. Thomas Armstrong, SBN 1016529
Douglas M. Raines, SBN 1059539
VON BRIESEN & ROPER, S.C.
411 East Wisconsin Ave., Suite 700
Milwaukee, WI 53202
Tel: (414) 276-1122
Fax: (414) 276-6281

CERTIFICATE OF SERVICE

I hereby certify that on September 22, 2011, I personally caused three copies of the Respondent's Brief and Appendix to be sent by e-mail and mailed by first-class postage prepaid mail to:

Elizabeth J. Eberle
Miner, Barnhill & Galland, P.C.
44 E. Mifflin Street, Suite 803
Madison, WI 53703-2800

Dated this 22nd day of September, 2011.

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Milwaukee, WI 53202
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